HON'BLE SRI JUSTICE BILAL NAZKI

AND

HON'BLE SRI JUSTICE S.ANANDA REDDY

Writ Petition No. 16154 of 2005

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Dt. ..12..2005

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Between:

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Coastal Papers,

(A Division of the Andhra Pradesh

Paper Mills Limited) M.R. Palem (A.P.)

…Petitioner

and

Commissioner of Central Excise,

Visakhapatnam-II Commissionerate,

Port Area, Visakhapatnam – 35 & Another

… Respondents

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HON'BLE SRI JUSTICE BILAL NAZKI

AND

HON'BLE SRI JUSTICE S.ANANDA REDDY

Writ Petition No. 16154 of 2005

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O R D E R: (Per Hon'ble Mr. Justice S.Ananda Reddy)

This Writ Petition is filed by the petitioner praying for the issue of writ of certiorari quashing the final orders passed by the 2nd respondent viz., Customs, Excise and Service Tax Appellate Tribunal, Bangalore (hereinafter referred to as 'the Tribunal') in Appeal Nos.666 and 669 of 2005, dated 27.4.2005 holding that the orders passed by the Tribunal are illegal and unsustainable in view of the exemption notifications which are applicable for the relevant period in question.

2. The petitioner is a Company carrying manufacture and sale of various kinds of paper, such as writing and printing paper, Kraft paper, newsprint paper etc. It was the case of the petitioner that there was some dispute as to the entitlement of exemption in respect of Kraft paper manufactured by the petitioner-Company. Therefore, exemption was claimed in respect of writing and printing paper to the extent of first clearance of 3500 M.T. manufactured by it with nill duty; while at the same time paying duty at advalorem in respect of the Kraft paper manufactured by it. But, however, subsequently a show cause notice was issued to the petitioner not only demanding payment of advalorem duty but also proposing to levy penalty on the ground that the Kraft paper which was cleared by the petitioner by paying advalorem duty ought to have been included for the purpose of claiming exemption out of the first clearance of 3500 MT, thereby paid less duty and in the process suppressed material facts. Hence, the penalty.

3. The petitioner filed the explanation to the show cause notice explaining the circumstances under which the petitioner paid advalorem duty in respect of the Kraft paper while claiming exemption in respect of writing and printing paper. The 1st respondent, however, rejected the explanation and passed orders for recovery of advalorem duty as well as levying penalty. The said orders of the Commissioner were the subject matters of appeals both by the assessee as well as by the department. The assessee is aggrieved to the extent of levying or demanding advalorem duty as well as the penalty while the department was in appeal in not ordering confiscation of the goods as well as seized vehicles. The Tribunal, after hearing, partly allowed the appeal of the assessee, who is the present petitioner,

setting aside the levy of penalty; and insofar as the advalorem duty is concerned the appellate Tribunal sustained, but, at the same time directed to adjust the amount of duty already paid in respect of the Kraft paper. Aggrieved by the same, the assessee has come up with the present Writ Petition.

4. At the time of hearing a preliminary objection has been raised as to the maintainability of the Writ Petition as there was a specific provision viz., Sec.35-G of the Central Excise Act where an appeal is provided against the order of the appellate Tribunal. However, the learned Senior Counsel for the petitioner contended that the Writ Petition is maintainable, and not barred, as the appeal provided under the Act is not an effective remedy. It is the contention of the learned counsel that due to the conduct of the department, which issued show cause notice as to the non-availability of exemption in respect of the Kraft paper, the petitioner had concede the objection of the department and paid duty on the Kraft paper while claiming exemption in respect of the writing and printing paper. Therefore, it is not open to the department, having raised an objection as to the availability of exemption in respect of Kraft paper, to contend that the petitioner had suppressed the material facts and paid duty on Kraft paper; while claiming exemption on writing and printing paper. The learned counsel also contended that the petitioner cannot raise these contentions in the appeal, if filed against the order of the Tribunal, but it can successfully advance in a Writ Petition filed under Art.226 of the Constitution of India. In support of his contention that the Writ Petition is not barred even when a remedy of appeal is available, the learned counsel relied upon a decision of the Delhi High Court in ***Shilp Impex v. Union of India***. That is a case where one Mauve & Crimson imported consignment of toys under invoice dated 12.02.1999 for US $ 10,111.60 and filed Bill of Entry, dated 26.02.1999. The said concern could not make payment to the consignor of the imported toys. Shipper approached the petitioner to buy the materials. The Shipping Agent filed an undertaking with the Commissioner of Customs, Inland Container Depot (for short, the Commissioner) and permission was accorded to amend the Import General Manifest in the name of the petitioner. On 11.06.1999, Bill of Entry in favour of the petitioner was filed with the Commissioner. During the course of determining the value of the imported

goods, the petitioner declared the value showing as genuine, bona fide and real value, at Rs.4,34,855/-. However, the Joint Commissioner enhanced the value to Rs.6,44,997/- and further ordered for confiscation, while at the same time imposing Rs.2,00,000/- as redemption fine and penalty of Rs.50,000/- in addition to duty of Rs.1,80,000/-. Thirty days time was granted to the petitioner to deposit the fine and the penalty. The said amounts were made without any adjudication. However, to avoid demurrage, the amounts were paid by the petitioner. But, subsequently, without releasing the goods to the petitioner, they were disposed of even before the expiry of the date by which he was asked to pay the amounts for a lower price than what was shown in the invoice, leave it about the enhanced value fixed by the department. Under those circumstances, the petitioner approached by way of Writ Petition. In that case, when the department raised a plea that the petitioner has got a remedy of appeal, the Delhi High Court rejected the said objection holding that in view of the peculiar circumstances it would not be proper to throw out the petition on the ground of existence of an alternative remedy.

5. The learned counsel also relied upon a decision of the Apex Court in ***State of Punjab v. Nestle India Ltd.***. In that case, the Respondent Company claimed that it is not liable to pay purchase tax on milk on the ground of promissory estoppel, especially in the light of the declaration made by the Chief Minister in the State Level function of dairy farmers that the State Government had abolished purchase tax on milk and milk products, which was widely published in the newspapers. The said declaration was even re-affirmed by the Finance Minister in the budget speech. However, no notification was issued under the provisions of the Punjab GST Act, 1948. Therefore, the tax was demanded from the Respondent Company. The respondent then filed Writ Petition challenging the demand on the ground that the Government had decided to abolish the purchase tax on milk for the period in question. The High Court held that the respondents therein had acted on the representation made and could not be asked to pay purchase tax w.e.f. 01.04.1996, but would be liable after the decision of the Government for the subsequent period i.e., from 4.6.1997. The said decision was assailed before the Apex Court by the State Government. The Apex Court upheld the said decision and dismissed the

appeals of the State Government.

6. The learned counsel also relied upon a Full Bench decision of this Court in ***Panchalingal Carbonic Gas Pvt. Ltd. vs. State of Andhra Pradesh*** . It is also on the same issue of promissory estoppel. Therefore, the learned counsel contended that there is no bar in entertaining the Writ Petition and adjudicating the issues that are raised by the petitioner.

7. Opposing the said claim, the learned Assistant Solicitor General contended that there are no special facts or circumstances, which warrant to entertain the Writ Petition when the petitioner has got an appeal remedy to the very same Court under the provisions of the Central Excise Act. The learned counsel also contended that the show cause notice that was issued by the department is as to the claim made by the petitioner as to the exemption in respect of writing and printing paper and not exclusively for kraft paper. Therefore, it was not open to the petitioner to pay tax as well as to claim exemption according to his convenience.

8. The learned counsel also strongly relied upon a decision of the Supreme Court in ***Chanan Singh & Sons v. CCE*** , where the Apex Court while considering the maintainability of writ petition by-passing the remedy of appeal, upheld an order of the High Court holding that the Writ Petition against the order of CEGAT was rightly dismissed by the High Court on availability of a statutory alternative remedy.

9. Heard both the learned counsel and considered the material on record.

10. Admittedly, an effective alternative remedy of appeal is provided under Sec.35-G of the Central Excise Act. Though the learned counsel relied upon certain decisions of the Apex Court as well as the High Court of Delhi, those decisions could not help the petitioner in any way, as, admittedly, the Delhi High Court specifically held that the facts in that case are peculiar where in fact the department had high-handedly disposed of the imported goods even before the period fixed for payment of the amounts specified in its order; while the decision of the Supreme Court is on a different issue. The decision of the Apex Court in ***Chanan Singh & Sons v. CCE*** (4 supra) is directly on the issue, where the Apex Court upheld the view taken by the High Court in dismissing the Writ Petition on the ground of alternative remedy

available.

11. Under the above circumstances, without going into the merits of the matter, the Writ Petition is dismissed, as the petitioner is having an effective and alternative statutory remedy of appeal. No costs.

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Bilal Nazki, J.

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S.Ananda Reddy, J.

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(Prepared by Hon'ble Sri Justice S.Ananda Reddy)

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Circulated to

HON'BLE SRI JUSTICE BILAL NAZKI

for perusal.